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VIA ECF

The Hon. Edgardo Ramos
Thurgood Marshall United States Courthouse, Rm. 619
40 Foley Square
New York, NY 10007

Re: *Fioranelli v. CBS Broadcasting Inc., et al.* (Case No. 15-cv-00952)

Dear Judge Ramos:

We represent CBS Broadcasting Inc., BBC Worldwide Americas, Inc., T3 Media, Inc., MorningStar Entertainment, LLC, and A&E Television Networks, LLC (collectively, "Defendants"), the named defendants who thus far have been served in this matter. We write in accordance with the Court's Individual Practices to request a pre-motion conference in anticipation of Defendants' motion to dismiss plaintiff Anthony Fioranelli's Complaint.

Plaintiff claims that 16 named companies (plus many unknown John Does) infringed his copyright by making unauthorized use of his video of events on 9/11. In an effort to increase the settlement value of the case, plaintiff repackaged his single copyright claim into 10 additional causes of action under state and federal law, all based on the same alleged copying of his video. These claims are subject to dismissal for at least three reasons: (i) all of the state law claims are preempted by the Copyright Act, 17 U.S.C. § 301; (ii) the Lanham Act and state-law unfair competition claims are barred under *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003); and (iii) certain of plaintiff's claims fail to plead essential elements of the causes of action they attempt to assert. Moreover, because plaintiff's copyright registrations were issued after the alleged infringements began, plaintiff's claim for statutory damages should be dismissed.

1. Preemption of Plaintiff's State Law Claims

The Copyright Act expressly preempts state law claims where, as here, (1) the works at issue "come within the subject matter of copyright," and (2) the rights being asserted "are equivalent to any of the exclusive rights within the general scope of copyright." 17 U.S.C. § 301; *Forest Park Pictures v. Universal Television Network, Inc.*, 683 F.3d 424, 429 (2d Cir. 2012). Here, the subject matter requirement is easily met, as plaintiff claims a copyright in his video and photographs. *See* Compl. ¶¶ 23-24. As shown below, the second requirement also is met because plaintiff's claims seek relief for the same conduct covered by the Copyright Act—namely that Defendants allegedly made unauthorized reproduction, distribution, display, or licensing of plaintiff's works. *See* 17 U.S.C. § 106.

- Tort Claims: Plaintiff asserts claims for Conversion (Count V), interference with contractual relations and prospective advantage (Counts VIII, IX), unjust enrichment (Count XI) and for "willful intentional tort/lack of due diligence" (Count XII). As pleaded, all of these claims seek to vindicate rights addressed by the Copyright Act. *See, e.g.*, Compl. ¶ 89 ("Defendants' conducts constitute a conversion *by unauthorized use of Plaintiff's exclusive right and interest subject to the Copyright Act*." (emphasis added)); ¶ 104 (claiming interference with contractual relations because Defendants "licens[ed] other parties to *use films embodying the copyrighted material*" (emphasis added)); ¶ 111 ("Defendants have entered into numerous valid agreements for unauthorized *use of the films embodying the copyrighted material*." (emphasis added)). These claims merely "'seek[] to redress a legal or equitable right that is equivalent to exclusive rights protected by the Copyright Act: the exclusive rights to publish, copy and distribute [his work] under [his] own name,'" and thus are preempted. *Gary Friedich Enter., LLC v. Marvel Enter., Inc.*, 713 F. Supp. 2d 215, 221 (S.D.N.Y. 2010); *see, e.g.*, *Briarpatch Ltd. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 306 (2d Cir. 2004) ("plaintiffs' unjust enrichment claim against Phoenix is preempted by the Copyright Act"); *Avalos v. IAC/Interactivecorp.*, No. 13–CV–8351 (JMF), 2014 WL 5493242, at *7 (S.D.N.Y. Oct. 30, 2014) (conversion claim preempted because it is "based on Defendants' allegedly wrongful commercial exploitation of [his works], and the gravamen of the claim is plainly 'unauthorized publication.'").

- Unfair Competition and False Advertising Claims: Plaintiff's claims for unfair competition (Count IV, VI) and false advertising (Count VII) are also preempted. Courts have held that:

  > In order to avoid preemption, that which is claimed to be unfair competition must be something different from copying, or the fruits of copying, or the intent or bad faith that can be inferred from the act of copying; if the harm arises from the simple fact of copying, the claim falls within the Copyright Act and is preempted.

  Eyal R.D. Corp. v. Jewelex N.Y. Ltd., 784 F. Supp. 2d 441, 447 (S.D.N.Y. 2011). Here, plaintiff's claim is based entirely on alleged unauthorized copying: "Defendants unauthorized use of Plaintiff's footage and work falsely represents that Defendants' content emanate from . . . Plaintiff." Compl. ¶ 83. "Such claims are generally preempted by the Copyright Act." *Gary Friedich*, 713 F. Supp. 2d at 220.

- Contract Claim (Counts X): Plaintiff's breach of contract claim asserts nothing more than that CBS breached an agreement with plaintiff by "engaging in unauthorized distribution and licensing of Plaintiff's Copyrighted Works [to] numerous Sublicensees." Compl. ¶¶ 117-18. Thus, plaintiff's contract claim once again seeks to vindicate exclusive distribution and licensing rights under the Copyright Act and does not point to any promise or provision in the purported agreement as the requisite "extra element" to avoid preemption. *See Forest Park*, 683 F.3d at 432-33 (holding that contract claim was *not* preempted where contract contained a promise to pay); *Am. Movie Classics Co. v. Turner Enter. Co.*, 922 F. Supp. 926, 931-32 (S.D.N.Y. 1996) (holding that contract claim *was* preempted where claim was premised on contract's exclusive exhibition rights provision).

2. Lanham Act and Unfair Competition Claims Barred by *Dastar*

Plaintiff's Lanham Act and state law unfair competition and false advertising claims separately should be dismissed pursuant to the Supreme Court's decision in *Dastar*, 539 U.S. 23, which precludes plaintiffs from invoking unfair competition and false advertising claims "as an end run around the copyright laws or to add another layer of protection to copyright holders." *Agence France Presse v. Morel*, 769 F. Supp. 2d 295, 307 (S.D.N.Y. 2011) (citing *Dastar*, 539 U.S. at 33-34). Plaintiff's Lanham Act, unfair competition and false advertising claims are based on the same conduct as his copyright claim. *See* Compl. ¶¶ 72-73, 79-80, 83, 95, 98. Allowing these claims to proceed would create "a species of mutant copyright law," which the law does not permit. *Dastar*, 539 U.S. at 34. Thus, courts routinely dismiss these claims as a matter of law. *See, e.g.*, *Cooley v. Penguin Group (USA) Inc.*, 31 F. Supp. 3d 599, 613-14 (S.D.N.Y. 2014); *Avalos*, 2014 WL 5493242, at *3-5; *Agence France Presse*, 769 F. Supp. 2d at 307-08.

3. Claims Not Adequately Pleaded

At least two of plaintiff's claims independently should be dismissed for failure to plead essential elements of those causes of action. Plaintiff's false advertising claim under N.Y. Gen. Bus. Law § 350 (Count VII) fails because it does not allege any advertisement or statement made by any defendant and how those statements were misleading. *See Bel Canto Design, Ltd. v. MSS HiFi, Inc.*, 2012 WL 2376466, at *16-17 (S.D.N.Y. June 20, 2012). Similarly, plaintiff's ambiguous claim for "willful intentional tort/lack of due diligence" (Count XII), should be dismissed because it does not and cannot allege that the "sole motivation for the damaging acts has been a malicious intention to injure the plaintiff." *See G-I Holdings, Inc. v. Baron & Budd*, 179 F. Supp. 2d 233, 251 (S.D.N.Y. 2001). Here, the Complaint confirms the Defendants' economic—not malicious—motive for their conduct: use of the works was "done for profit" and "commercial gain." Compl. ¶ 48. "When a plaintiff sets forth allegations that indicate that other motives were involved in the complained of conduct besides disinterested malevolence, the [prima facie tort] cause of action must be dismissed." *G-I Holdings*, 179 F. Supp. 2d at 251.

4. No Statutory Damages or Attorney's Fees

Plaintiff seeks "statutory damages pursuant to 17 U.S.C. § 504(c)(2)," "including attorney's fees" for his copyright claims (Counts I, II). Compl. ¶¶ 58, 64, 65. However, the Copyright Act clearly specifies that "*no* award of statutory damages or of attorney's fees, as provided by sections 504 and 505, shall be made for . . . any infringement of copyright commenced after first publication of the work and before the effective date of its registration." 17 U.S.C. § 412 (emphasis added). The Copyright Office's records reflect that plaintiff's pleaded registrations (PA 1-912-285 and PA 1-912-286) were issued in **2014**. But, the infringing acts alleged by plaintiff commenced "in about **2005-2006**." Compl. ¶ 27 (emphasis added). Thus, plaintiff's claims for statutory damages and attorney's fees should be dismissed or stricken. *Cognotec Servs., Ltd. v. Morgan Guar. Trust Co.*, 862 F. Supp. 45, 52 (S.D.N.Y. 1994) ("Any awards of statutory damages or of attorney's fees are precluded when the infringement occurs prior to the effective date of registration").

Accordingly, Defendants intend to move to dismiss the complaint, and respectfully request the Court to grant leave to file such a motion or, alternatively, to schedule a pre-motion conference at the Court's convenience.

Sincerely,

LEVINE SULLIVAN KOCH & SCHULZ, LLP

By: ______________________________
Robert Penchina

cc: Maxim H. Waldbaum, Esq. (by ECF)
Robert D. Katz, Esq. (by ECF)